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# The Racial Evolution of Justice Kennedy and Its Implications for Law, Theory, and the End of the Second Reconstruction

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# THE RACIAL EVOLUTION OF JUSTICE KENNEDY AND ITS IMPLICATIONS FOR LAW, THEORY, AND THE END OF THE SECOND RECONSTRUCTION

*Luis Fuentes-Rohwer\**

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## ABSTRACT

*This Article examines the recent turn in Justice Kennedy's race jurisprudence. The shift is palpable, from a narrow and uncompromising approach to the use of race by state actors to a more nuanced and contextual understanding of the role that race plays in American society. This is no small change, best explained by Justice Kennedy's status on the Court as a "super median." This is a position of power and influence, as any majority coalition must count on Justice Kennedy's vote; but more importantly, it is also a position of true independence. Justice Kennedy entertains his idiosyncratic and very personal views on the questions of the day because he can. He can even contradict himself.*

*Far more important than pinpointing the reasons for Justice Kennedy's newfound jurisprudential awareness are the implications of this shift. This Article examines three implications. First, litigators must learn Kennedy-speak and whatever issues occupy the Justice's attention. Second, a constitutional world where one justice single-handedly controls constitutional doctrine places grave stress on the moral legitimacy of judicial review. This is the counter-majoritarian difficulty on steroids. Finally, the implications for constitutional law are severe. In particular, this Article argues that the fate of the Second Reconstruction hinges on the idealism of Justice Kennedy. Reflecting on the Court's 2010 October Term, this Article concludes that the Second Reconstruction—and particularly the Voting Rights Act, the crown jewel of the civil rights movement—appears safe for now.*

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“It’s Justice Anthony Kennedy’s country—the rest of us just  
live in it.”<sup>1</sup>

## INTRODUCTION

In his concurring opinion in *Georgia v. Ashcroft*,<sup>2</sup> Justice Kennedy warned that “considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 [of the Voting Rights Act] seem to be what save it under § 5 [of the Act].”<sup>3</sup> As the present case did not raise this issue, the Court could avoid it for the moment. But he made clear that the Court must confront this

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1. Noah Feldman, *The United States of Justice Kennedy*, BLOOMBERG VIEW (May 31, 2011, 9:52 AM), <http://www.bloombergvew.com/articles/2011-05-30/how-it-became-the-united-states-of-justice-kennedy-noah-feldman>.

2. 539 U.S. 461 (2003).

3. *Id.* at 491 (Kennedy, J., concurring).

“fundamental flaw” in the future. More recently, in his concurring opinion in *Ricci v. DeStefano*,<sup>4</sup> Justice Scalia similarly warned that the Court’s resolution in *Ricci* “merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?”<sup>5</sup> To his mind, “the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.”<sup>6</sup> He underscored that this was not an easy question.

The future is here. In two recent cases, the Court began to examine, in ways it has never examined before, the constitutionality of the Second Reconstruction. The first case, *Shelby County v. Holder*, considered the constitutionality of the Voting Rights Act.<sup>7</sup> Chief Justice Roberts’s opinion for the Court struck down the Act’s coverage formula and by implication cast grave doubts on the future of our civil rights edifice.<sup>8</sup> The second case, *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, considered the constitutional viability of the disparate impact test.<sup>9</sup> After *Shelby County*, a case best explained as a crass exercise in judicial attitudinalism,<sup>10</sup> the continued constitutionality of the Second Reconstruction was grim. But in a surprising 5–4 opinion, Justice Kennedy concluded that disparate-impact claims were cognizable under the Fair Housing Act.<sup>11</sup> It would appear, contra *Shelby County*, that Title VII of the Civil Rights Act of 1964 and § 2 of the Voting Rights Act are safe, at least in the short term. How can this apparent shift be explained?

For clues, consider the 2006 Term and the notorious and deeply fractured *Parents Involved in Community Schools v. Seattle School District No. 1* decision.<sup>12</sup> Few decisions have garnered as much attention in the last few years as *Parents Involved*. In an opinion

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4. 557 U.S. 557 (2009).

5. *Id.* at 594 (Scalia, J., concurring).

6. *Id.* at 595–96.

7. 133 S. Ct. 2612 (2013).

8. *See id.* at 2630–31.

9. 135 S. Ct. 2507, 2513 (2015).

10. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State’s Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 520–21 (2014).

11. *Tex. Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2525.

12. 551 U.S. 701 (2007).

authored by Chief Justice Roberts, the Court struck down two voluntary racial integration plans for public schools in Louisville and Seattle.<sup>13</sup> But only a plurality of justices would go as far as to prohibit any use of race in student assignments.<sup>14</sup> Justice Kennedy provided the fifth vote yet refused to go quite that far. In a separate concurrence, he left open some room for school boards to consider the use of race in student assignments while pursuing the goal of integration.<sup>15</sup> This is the aspect of Kennedy's opinion that strikes a familiar chord. He is comfortably in the middle, wielding inordinate power and control as the Court's "super median."<sup>16</sup> This is also where the familiarities end.

To read Justice Kennedy's opinion in *Parents Involved* is to see a side of the Justice we have not seen before. This is true from the first paragraph of his opinion:

The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all. In these cases two school districts in different parts of the country seek to teach that principle by having classrooms that reflect the racial makeup of the surrounding community. That the school districts consider these plans to be necessary should remind us our highest aspirations are yet unfulfilled.<sup>17</sup>

This opening salvo highlights Justice Kennedy's posture in his concurrence. The framing is inescapable. Take, for example, his view later in the opinion that "[t]he enduring hope is that race should not matter; the reality is that too often it does."<sup>18</sup> In direct response to the plurality's pithy phrase that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"<sup>19</sup> Kennedy argues that "[f]ifty years of experience since *Brown v. Board of Education* should teach us that the problem before us defies so easy a solution."<sup>20</sup> Kennedy even takes on Justice Harlan's dissent in *Plessy v. Ferguson* and the view that "[o]ur Constitution is color-

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13. *Id.*

14. *See id.* at 725-33, 745-48.

15. *See id.* at 787-90 (Kennedy, J., concurring in part and concurring in the judgment).

16. *See* Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37 (2008).

17. *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring in part and concurring in the judgment).

18. *Id.* at 787.

19. *Id.* at 748 (plurality opinion).

20. *Id.* at 788 (Kennedy, J., concurring in part and concurring in the judgment) (citation omitted).

blind.”<sup>21</sup> This statement often stands at the heart of conservative attacks on race conscious measures. Yet Kennedy argues that while justified in the racialized context of the late-nineteenth century, it is not justified today as anything more than an aspiration. “In the real world, it is regrettable to say, it cannot be a universal constitutional principle.”<sup>22</sup>

These arguments should surprise anyone familiar with Justice Kennedy’s race jurisprudence. In his concurring opinion in *City of Richmond v. J.A. Croson Co.*,<sup>23</sup> for example, Justice Kennedy wrote that “[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause.”<sup>24</sup> In saying this, he counseled that the use of race by the state must only be “a last resort.”<sup>25</sup> Similarly, in his dissenting opinion in *Grutter v. Bollinger*,<sup>26</sup> he referred to the use of race by the state as a “corrosive category”<sup>27</sup> and argued that:

Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality. The majority today refuses to be faithful to the settled principle of strict review designed to reflect these concerns.<sup>28</sup>

These are hardly isolated instances. Over the course of his long tenure on the bench, Justice Kennedy has demonstrated time and again that his approach to the use of race by the state is narrow, formalistic, and one that ultimately renders the state action at issue unconstitutional.<sup>29</sup>

The contrast between these two judicial approaches to the use of race by the state is palpable. But it is more than just the explicit words that Justice Kennedy uses to express his views; it is the spirit in which he writes them and the tenor of his opinions. To read his early opinions on race is to see an unyielding skepticism about the use of race by the state. This is true across contexts, whether college

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21. *Id.*

22. *Id.*

23. 488 U.S. 469 (1989).

24. *Id.* at 518 (Kennedy, J., concurring in part and concurring in the judgment).

25. *Id.* at 519.

26. 539 U.S. 306 (2003).

27. *Id.* at 394 (Kennedy, J., dissenting).

28. *Id.* at 388.

29. See *Miller v. Johnson*, 515 U.S. 900, 927-28 (1995); *Presley v. Etowah Cty. Comm’n*, 502 U.S. 491, 509-10 (1992); *Grutter*, 539 U.S. at 395 (Kennedy, J., dissenting); *Ricci v. DeStefano*, 557 U.S. 557, 592-93 (2009).

admissions,<sup>30</sup> employment,<sup>31</sup> set-asides,<sup>32</sup> or redistricting.<sup>33</sup> But his more recent opinions—of which both *Parents Involved*<sup>34</sup> and *Inclusive Communities Project* are appropriate examples—cannot be similarly catalogued. The racial skepticism remains, to be sure, but it is a skepticism now tempered by a far different view of the world and of the role that race plays within it, both as historical artifact and social reality. Even as he joined the judgment of the Court in *Parents Involved*, for example, Justice Kennedy wrote that “[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.”<sup>35</sup> Similarly, in *LULAC v. Perry*, a case that examined the notorious mid-census political gerrymander in Texas,<sup>36</sup> Justice Kennedy concluded that the decision to dismantle a district where Latino voters would soon achieve majority status violated the Voting Rights Act.<sup>37</sup> This was a remarkable departure for Justice Kennedy, not the least of which because this was the first time during his tenure on the Court when he voted to find a statutory violation under the Act.<sup>38</sup> What makes his *LULAC* opinion “striking”<sup>39</sup> is the reason he offered for his conclusion: that the state had only decided to break up the old District 23 when Latinos within it “had found an efficacious political identity.”<sup>40</sup> This is a remarkable position for a justice who held a strong anti-essentialist view on questions of race as late as 2001.<sup>41</sup>

30. See *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

31. See *Ricci*, 557 U.S. at 563.

32. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in the judgment); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 631 (1990) (Kennedy, J., dissenting).

33. See *Miller*, 515 U.S. at 903.

34. For a terrific analysis of Justice Kennedy’s opinion in *Parents Involved*, see Kevin Brown, *Reflections on Justice Kennedy’s Opinion in Parents Involved: Why Fifty Years of Experience Shows Kennedy Is Right*, 59 S.C. L. REV. 735 (2008).

35. 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

36. 548 U.S. 399, 409 (2006).

37. *Id.* at 438-39, 442.

38. Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 109 (2007).

39. *Id.*

40. *LULAC*, 548 U.S. at 435.

41. I refer here to *Easley v. Cromartie*, 532 U.S. 234, 267 (2001) (Thomas, J., dissenting). This argument assumes that Justice Kennedy still held the views he expressed first in *Metro Broadcasting* and as late as 1996 in his majority opinion in *Miller*. *Easley* is only the last installment in the *Shaw-Miller* line of cases, which are

Can these disparate jurisprudential accounts be reconciled? One obvious explanation focuses on Justice Kennedy's status as swing voter. This is a powerful argument. With Justice O'Connor safely occupying the swing chair, Justice Kennedy could vote his true preferences because his vote was not determinative to the final outcome in cases that mattered. It is only upon O'Connor's retirement that Justice Kennedy's views begin to shift. In this vein, consider what Adam Cohen wrote at the end of the Court's 2006 Term:

Perhaps most important, it is not yet clear how Justice Kennedy will be changed by his vastly expanded influence. Justice O'Connor was very aware of her position as the swing justice, and it made her deeply aware of the impact her votes had on real people's lives. Justice Kennedy may inherit that mantle of concern. It is one thing to argue in dissent that campaign finance laws violate the First Amendment. It is quite another to cast the vote that prevents a nation weary of lobbying scandals from trying to clean up its elections.<sup>42</sup>

This same argument may be applied to Justice Kennedy's equal protection jurisprudence. Once he came to the middle and the outcome of some of the most hotly contested policy questions hinged on his vote, the stakes changed. His jurisprudence changed accordingly.

This is a persuasive explanation, but only to a point. Swing justices are often pragmatists, putting together opinions that will satisfy a majority of five. This is one way to explain Justice O'Connor's opinion in *Grutter*, for example, or Justice Powell's opinion in *Regents of the University of California v. Bakke*, as triumphs in pragmatism. But Justice Kennedy is hardly a pragmatist, but an idealist. His opinions in *LULAC* and *Parents Involved* clearly suggest as much.<sup>43</sup> Justice Kennedy is not looking for the lowest common denominator among the justices but is instead able to reach for the stars and write exactly the opinion he wishes to write unencumbered by the noise from neighboring chambers. His cultural

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grounded in a strong anti-essentialist rationale. See Guy-Uriel E. Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185, 1194 (2007).

42. Adam Cohen, *Anthony Kennedy Is Ready for His Close-Up*, N.Y. TIMES (Apr. 3, 2006), <http://www.nytimes.com/2006/04/03/opinion/03mon4.html?scp=10&sq=justice+kennedy+swing+vote&st=nyt>.

43. See Gerken, *supra* note 38, at 105.



worldview drives his analysis,<sup>44</sup> as well as the particular legal domain under which the facts of the case arise.<sup>45</sup>

Thus the question at the heart of this Article: how to explain Justice Kennedy's apparent evolution on race questions? In his early days on the Court, Justice Kennedy followed a narrow and formalistic colorblind path when interpreting the Fourteenth Amendment.<sup>46</sup> He continued with this approach up to 2003, as seen in his dissent in *Grutter*.<sup>47</sup> But something changed around 2006. This is when Kennedy became the Court's resident super median. It is hardly a coincidence that his newfound voice on questions of race began the term after Justice O'Connor's retirement. But that is precisely why domains and his cultural worldview have any bite at all. Once Justice Kennedy achieved super median status, he could let his aspirations and idealism run free, untethered by the preferences and idealism of others. In other words, Kennedy's opinions are not those of a pragmatist because they do not have to be. This is attitudinalism with a vengeance.

But this is only part of the story. As this Article explains below, swing justices—and particularly super medians—do not behave as freely and as independently as we think. This is an interesting paradox. The more freedom and independence a justice accrues as she moves towards the status of median justice, the more than public opinion influences her decisions. Justice Kennedy's shift on race, in other words, is driven by public opinion. Thinking about Justice Kennedy as super median thus raises interesting questions about the status of public opinion and race in contemporary American society.

Far more important than pinpointing the reasons for Kennedy's newfound jurisprudential awareness are the implications of this shift. This Article discusses three such implications. First, Kennedy's shift has direct implications for constitutional litigation and the civil rights bar. Litigators must learn to speak in the language that now occupies Justice Kennedy's attention. Second, the shift has important implications for constitutional theory. The moral case against judicial review is powerful enough in the abstract.<sup>48</sup> The charge becomes

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44. See Pamela S. Karlan, *The Law of Small Numbers: Gonzalez v. Carhart, Parents Involved in Community Schools, and Some Themes from the First Full Term of the Roberts Court*, 86 N.C. L. REV. 1369 (2008).

45. See Gerken, *supra* note 38, at 107.

46. See Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1758 (1996).

47. *Grutter v. Bolinger*, 539 U.S. 306, 395 (2003) (Kennedy, J., dissenting).

48. See JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

almost unanswerable under a prism where a singular justice is able to single-handedly influence the future of the most pressing policy questions of our generation in accordance to his particular idealism and cultural worldview. This is a very serious charge against the institution of judicial review, a charge that demands an answer. Finally, and in line with the previous critique, Kennedy's shift has direct implications for constitutional law. This is because the end of the Second Reconstruction essentially hinges on the idealism and worldview of Justice Kennedy. This final section parses through Justice Kennedy's jurisprudence for clues on his thinking about this particular domain.

This is a story in three Parts. Part I examines the evolving jurisprudence of Justice Kennedy on questions of race. Part II explains this evolution as a direct result of Justice Kennedy's position on the Court as a super median. Finally, Part III discusses the three leading implications of this argument.

# I. THE EVOLVING RACE JURISPRUDENCE OF JUSTICE KENNEDY

Something is amiss in Justice Kennedy's race jurisprudence. Go back to his early days on the Court, the days of *City of Richmond v. J.A. Croson Co.*,<sup>49</sup> *Metro Broadcasting, Inc. v. FCC*,<sup>50</sup> *Presley v. Etowah County Commission*,<sup>51</sup> and *Rice v. Cayetano*,<sup>52</sup> and you cannot miss the uncompromising and narrow nature of his approach to the use of race by the state. This is true both as a question of constitutional law and when interpreting federal statutes. But the story has begun to shift in recent years. In both *LULAC* and *Parents Involved*, Justice Kennedy is far more nuanced and compromising in his approach to the use of race. These decisions cannot be reconciled with Kennedy's early decisions. The Justice is clearly undergoing a shift in his thinking as reflected in his written opinions. This first Part details this shift.

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49. 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in the judgment).

50. 497 U.S. 547, 631-38 (1990) (Kennedy, J., dissenting).

51. 502 U.S. 491, 509-10 (1992).

52. 528 U.S. 495, 523-24 (2000).

A. First Pass: *City of Richmond*, *Metro Broadcasting*, and Race Neutrality, 1989-2000

In his early years on the Court, Justice Kennedy displayed a clear suspicion of any use of race by the state, as reflected in his uncompromising application of strict scrutiny across settings and contexts. This was true whether the governmental entity in question was a state, a local government, or any branch of the national government. This was also true even if the racial classification was benign in nature, designed to benefit historically underrepresented minorities. To Justice Kennedy, all uses of race must be catalogued under the same rubric, irrespective of the motive behind its implementation. Jim Crow laws, South African apartheid laws, and affirmative action policies were one and the same. Context and history meant nothing.

His first pass at the question came in *City of Richmond v. J.A. Croson Co.*<sup>53</sup> In the case, the Court considered whether a 30% racial set-aside policy by the Richmond city council could withstand constitutional scrutiny.<sup>54</sup> This was not by any reasonable measure an easy case. The first obvious difficulty centered on the proper standard of review for laws intended to benefit members of underrepresented racial groups.<sup>55</sup> The case also forced the Court to confront the legacy of discrimination in the South and the steps that state and local governments may take in compliance with the Equal Protection Clause to remedy this legacy.<sup>56</sup> A final difficulty focused on the set-aside policy at the heart of the case.<sup>57</sup> This was a classic and expected outcome of a political struggle as seen every day in American politics. Could the Court strike down this particular bargain under the guise of upholding a prior *constitutional* compromise intended to bring former slaves into full citizenship status?

The conservative majority on the Court had very little difficulty striking down the Richmond set-aside policy.<sup>58</sup> In a lead opinion authored by Justice O'Connor, the Court concluded that the use of race by the state must be subject to strict scrutiny.<sup>59</sup> This was true

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53. 488 U.S. 469 (1989).

54. *Id.* at 476-78.

55. *Id.* at 493-95.

56. *Id.* at 498-99.

57. *See id.* at 507-08.

58. *Id.* at 511.

59. *Id.* at 493-95.

irrespective of the stated intentions of those who enacted the policies and regardless of the source of the policy.<sup>60</sup> In fact, in this particular case, the majority found reason to be distrustful of the political body behind the policy because the Richmond city council had a majority-black membership.<sup>61</sup> Accordingly, “[t]he concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.”<sup>62</sup> The Court was also unpersuaded by the context in the case and the fact that this was an attempt by the city of Richmond to address its own legacy of discrimination.<sup>63</sup> This point elicited a spirited response from Justice Marshall, who argued in dissent that:

Our cases in the areas of school desegregation, voting rights, and affirmative action have demonstrated time and again that race is constitutionally germane, precisely because race remains dismayingly relevant in American life.

In adopting its *prima facie* standard for States and localities, the majority closes its eyes to this constitutional history and social reality.<sup>64</sup>

Justice Kennedy concurred in the case, for two reasons. First, with Justice Scalia, he agreed that the principle of race neutrality lies as the moral imperative behind the command of equal protection.<sup>65</sup> And yet, he did not sign on to Justice Scalia’s opinion, which adopted a bright-line rule of striking down all racial preferences that are not designed to remedy prior unlawful acts of racial discrimination.<sup>66</sup> Instead, he wrote separately to underscore his agreement with Justice O’Connor’s adoption of a strict scrutiny test.<sup>67</sup> He did so because he was “not convinced” that Scalia’s rigid test was necessary “at this point.”<sup>68</sup> He was also “confident” that the

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60. *Id.* at 500-01.

61. *Id.* at 495-96.

62. *Id.* (citing John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 739 n.58 (1974) (“Of course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature.”)).

63. *Croson*, 488 U.S. at 498-99.

64. *Id.* at 558 (Marshall, J., dissenting).

65. *Id.* at 518 (Kennedy, J., concurring).

66. *Id.* at 518-19.

67. *Id.* at 519.

68. *Id.*

strict scrutiny test would “in application . . . operate in a manner generally consistent with the imperative of race neutrality.”<sup>69</sup>

There was no nuance here. There was no discussion of context or history or of the source for the command of racial neutrality. This was a simplistic, straight-forward concurrence fitting for a sixth grade civic class audience. Race is dangerous and toxic. It is up to the Court to ensure that the states use race only in the rarest of moments and under extenuating circumstances.

Second, Justice Kennedy was not ready to decide whether the source of the challenged policy mattered for constitutional purposes.<sup>70</sup> Or, in his words:

The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case.<sup>71</sup>

This was an important concession. It underscores Justice Kennedy’s penchant for deliberate adjudication as demanded by the common law approach.<sup>72</sup> But he need not wait too long to decide the question.

The following term, in *Metro Broadcasting, Inc. v. FCC*, the Court faced the question Justice Kennedy purposefully left open.<sup>73</sup> The case featured a number of racial preferences adopted by the Federal Communications Commission and endorsed by Congress in the assigning or transfer of broadcasting licenses to minority-owned firms.<sup>74</sup> In an opinion authored by Justice Brennan, the Court surprisingly upheld the federal program as consistent with equal protection principles.<sup>75</sup> The first line of the opinion spoke volumes about the Court’s posture in the case: “The policies before us today can best be understood by reference to the history of federal efforts to promote minority participation in the broadcasting industry.”<sup>76</sup> Consequently, the Court held that race-conscious plans directed by the federal government must serve important governmental goals and

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69. *Id.*

70. *Id.* at 518.

71. *Id.*

72. *See also id.* at 519 (“Nevertheless, given that a rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point.”).

73. 497 U.S. 547, 552 (1990).

74. *Id.* at 552, 584.

75. *Id.* at 552.

76. *Id.* at 552-53.

must be substantially related to those goals.<sup>77</sup> The Court concluded that the plan in question met this standard of review.<sup>78</sup>

Justice Kennedy, in an opinion joined by Justice Scalia, dissented.<sup>79</sup> This is a noteworthy opinion for at least two reasons. First, the narrow window that Justice Kennedy appeared to leave open in *Croson*—on the question of the proper standard of review for race conscious plans enacted by Congress—was closed emphatically in *Metro Broadcasting*. All uses of race, whether by the federal government or the states, are subject to strict scrutiny. This is noteworthy because it offers a glimpse into Justice Kennedy's approach to constitutional adjudication. It would be hard to believe that he would have reached a different answer to this question the prior term. But he did not answer the question because it was not properly presented.

Second, one cannot escape the ease with which Justice Kennedy analogized the plan under review to the most derided cases and regimes of the last hundred years. His begins with *Plessy* and argues that its "standard of review and its explication have disturbing parallels to today's majority opinion that should warn us something is amiss here."<sup>80</sup> In reference to the need under the policy to define which racial minorities are included as beneficiaries, Kennedy quotes Justice Stewart's dissent in *Fullilove v. Klutznick* that "[i]f the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935, translated in 4 Nazi Conspiracy and Aggression, Document No. 1417-PS, pp. 8-9 (1946)."<sup>81</sup> Justice Kennedy also makes use of *Korematsu v. United States* and South Africa's apartheid laws.<sup>82</sup>

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77. *Id.* at 564-65.

78. *Id.* at 566.

79. *Id.* at 631 (Kennedy, J., dissenting).

80. *Id.* at 632.

81. *Id.* at 633 n.1 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stewart, J., dissenting)).

82. *See id.* at 633, 635. In response, the majority "fail[s] to understand how Justice KENNEDY can pretend that examples of 'benign' race-conscious measures include South African apartheid, the 'separate-but-equal' law at issue in *Plessy v. Ferguson*, . . . and the internment of American citizens of Japanese ancestry upheld in *Korematsu v. United States*." *Id.* at 564 n.12 (majority opinion) (citations omitted). And more importantly, the majority is just as confident as Justice Kennedy is not that "an examination of the legislative scheme and its history will separate benign measures from other types of racial classifications." *Id.* (citation omitted).

Justice Kennedy concludes his short dissent with a passage worth quoting in full:

Perhaps the Court can succeed in its assumed role of case-by-case arbiter of when it is desirable and benign for the Government to disfavor some citizens and favor others based on the color of their skin. Perhaps the tolerance and decency to which our people aspire will let the disfavored rise above hostility and the favored escape condescension. But history suggests much peril in this enterprise, and so the Constitution forbids us to undertake it. I regret that after a century of judicial opinions we interpret the Constitution to do no more than move us from “separate but equal” to “unequal but benign.”<sup>83</sup>

This passage highlights Justice Kennedy’s narrow and acontextual approach to the use of race by the state. Its lessons are clear. Race is no more than skin color. Our racial history counsels that the use of race poses grave dangers. And there is no such thing as benign uses of race. We use race as a public policy tool at our own peril.

#### B. Coming into His Own: *Miller*’s Tale, 1993-2003

The 1990 Census and the resulting redistricting season thrust the Court right in the middle of a very contentious debate over the role of race in politics.<sup>84</sup> This debate presented the justices with very difficult questions of representation. How best to represent the interests of voters of color as required by the Voting Rights Act? In other words, how to resolve the inevitable tension between descriptive representation, which entailed the creation of majority-minority districts, and substantive representation, which focused on the election of like-minded representatives irrespective of race? Complicating matters, the use of race in redistricting has clear and direct political consequences. This is because racial minorities—and particularly black voters—are generally Democratic voters. To create majority-minority districts is to essentially pack Democratic voters. It is no surprise that Republican strategists prefer these districts, while Democratic leaders favor the representation of interests.

In the early 1990s, this tension reached the high court. And the justices failed to impress. The first case, *Shaw v. Reno*,<sup>85</sup> arose out of

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83. *Id.* at 637-38 (Kennedy, J., dissenting).

84. Mark A. Posner, *The Real Story Behind the Justice Department’s Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress*, 1 DUKE J. CONST. L. & PUB. POL’Y 79, 106 (2006); Joan Biskupic, *N.C. Case to Pose Test of Racial Redistricting: White Voters Challenge Black Majority Map*, WASH. POST, Apr. 20, 1993, at A4.

85. 509 U.S. 630 (1993).

familiar circumstances. Democratic leaders in North Carolina drew a state congressional map with only one majority-minority district.<sup>86</sup> The Department of Justice (DOJ) objected to this first plan and demanded the creation of a second majority-minority district.<sup>87</sup> This objection stemmed from the authority granted to the DOJ by the Voting Rights Act.<sup>88</sup> Whether this was the proper reading of the Act or not, it was clear that the State of North Carolina only drew this second district when required to do so by federal authorities.<sup>89</sup> But there were only so many Democratic voters to spread around, so in order to uphold the gains of the previous plan while complying with DOJ's reading of the law demanded much cartographical creativity. In the eyes of the conservative majority on the Court, in fact, the resulting districts were simply bizarre, too ugly for words, and clearly unconstitutional. In Justice O'Connor's words:

[W]e believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.<sup>90</sup>

A few things jump right off from this passage. First, note the allusion to apartheid once again. The analogy is particularly inapt here, since the districts at issue were some of the most integrated districts in the country and a near-perfect reflection of the racial composition of the state as a whole.<sup>91</sup> Second, the anti-essentialist impulse could not be clearer. People must be treated by the state as individuals and not members of groups, and they must not be stereotyped into roles and ascribed identities that they have not chosen for themselves.

Third, it is important that the Court paid no attention to the context under which this case arose and the empirical realities on the

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86. *Id.* at 633.

87. *Id.* at 635.

88. *Id.* at 634-35.

89. *Id.* at 635.

90. *Id.* at 647.

91. See Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 282.



ground. The fact that the state had been forced to draw the second district, or the fact that the pressure had come under DOJ's particular reading of the Voting Rights Act, proved irrelevant. The Court majority had its own particular story, and it was sticking to it.

Finally, it is crucial that the facts in *Shaw* did not fit traditional conceptions of constitutional harm in the voting rights context as then understood. That is, the facts fit neither vote dilution nor vote denial claims. This was something completely different, unless it was not different at all. The Court held that the use of race in redistricting violates equal protection principles when "a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification."<sup>92</sup> In so holding, the Court conceded that this claim was "analytically distinct"<sup>93</sup> from traditional equal protection claims. The claim soon came to be known as an "expressive harm."<sup>94</sup> The reach of this inquiry, at least in 1993, appeared boundless.

Soon after *Shaw*, it was open season on majority-minority districts. Or so it appeared. The question for the future was whether the *Shaw* inquiry demanded the existence of bizarre districts, as Justice O'Connor's language strongly suggested. But the Court forged a new path in the very next case. In *Miller v. Johnson*, the Court confronted a districting scheme that resembled the traditional districts of old.<sup>95</sup> The context was eerily similar: a districting plan, a DOJ objection, and the creation of a new majority black district.<sup>96</sup> What this plan lacked was a bizarre district in the mold of *Shaw*.<sup>97</sup> In an opinion authored by Justice Kennedy, however, the Court explained that "bizarreness is [not] a necessary element of the constitutional wrong or a threshold requirement of proof."<sup>98</sup> Rather, shape is important "because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in

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92. *Shaw*, 509 U.S. at 652.

93. *Id.*

94. See Richard H. Pildes & Richard G. Niemi, *Expressive Harms*, "Bizarre Districts," and *Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-07 (1993).

95. 515 U.S. 900 (1995).

96. *Id.* at 906-07.

97. *Id.* at 905-06.

98. *Id.* at 913.

drawing its district lines.”<sup>99</sup> This was the genesis, two years after *Shaw*, of the predominant factor test.

In concluding, Justice Kennedy offered an ode to the anti-essentialist principle at the heart of his opinion:<sup>100</sup>

The [Voting Rights] Act, and its grant of authority to the federal courts to uncover official efforts to abridge minorities’ right to vote, has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions. Only if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race. As a Nation we share both the obligation and the aspiration of working toward this end. The end is neither assured nor well served, however, by carving electorates into racial blocs. . . . It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.<sup>101</sup>

This conclusion is in line with *Shaw* in that they both share a disdain with race essentialism. Both opinions make clear that the state must not choose political identities for the voters; this is something that each individual voter must do for herself. Both opinions are also borne of an idealism that wishes to remove race from public life. This is true even if the facts on the ground counsel otherwise and irrespective of the views held by other institutional actors. The conservative majority holds epistemic authority on this question under its interpretation of the equality principle. There is no room for debate.

In the next case in this long and forgettable saga, Justice Kennedy reinforced his formalism on questions of race and redistricting. The case was *Bush v. Vera*.<sup>102</sup> Two particular passages of his concurring opinion intrigue me. The first is the passage where he argues that the Court “would no doubt apply strict scrutiny if a State decreed that certain districts had to be at least 50 percent white, and our analysis should be no different if the State so favors minority races.”<sup>103</sup> This is an arresting sentence. To be sure, a demand that districts must be “at least 50 percent white” should strike us as odd

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99. *Id.*

100. *See id.* at 911 (“[T]he Government must treat citizens ‘as individuals, not “as simply components of a racial, religious, sexual or national class.”’” (citation omitted)).

101. *Id.* at 927-28.

102. 517 U.S. 952 (1996).

103. *Id.* at 996 (Kennedy, J., concurring).

and even bizarre. The world of race and politics as practiced in the United States would have to evolve dramatically for such a demand to make any sense at all. I cannot even begin to imagine what such a world would look like. This is another way of saying that context and history make all the difference in the world. That Justice Kennedy uses this passage as a way to clinch his argument that strict scrutiny is the obvious standard in the case tells us a great deal about his frame of mind on questions of race in the mid-1990s.

The second is a passage where Justice Kennedy offers as an example of an unjustified racial district the notion of “gratuitous race-based districting.”<sup>104</sup> This would be districting where the state used race for no particular reason at all. To Justice Kennedy, any use of race by the state unsupported by a compelling state interest is a “gratuitous” use of race. This is something that the state must not do. Without question, this is a very narrow and unforgiving understanding of race. It is dismissive of our racial history. But more importantly, it is also the law.

C. A New Leaf: *LULAC*, *Parents Involved*, and *Inclusive Communities Project*, 2006-2015

As late as 2003, Justice Kennedy continued to hold narrow and formalistic views on questions of race. In *Grutter v. Bollinger*, for example, he argued in dissent that the Michigan Law School’s admissions plan could not survive a proper application of strict scrutiny.<sup>105</sup> Echoing the spirit of earlier analogies, he wrote that “[p]referment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.”<sup>106</sup> This is a view of race as a “corrosive category,” and one where only a narrowly tailored policy that pursues a compelling state interest can meet his standard of fairness.<sup>107</sup> Above all, as he reiterated throughout his dissent, his concern was that all applicants must receive individualized review.<sup>108</sup> This is the same anti-essentialist sentiment he expressed through the years.

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104. *Id.* at 999.

105. 539 U.S. 306, 388, 391 (2003) (Kennedy, J., dissenting).

106. *Id.* at 388.

107. *See id.* at 394 (Kennedy, J., dissenting) (“Prospective students, the courts, and the public can demand that the State and its law schools prove their process is fair and constitutional in every phase of implementation.”).

108. *See, e.g., id.* at 387.

And then, beginning in 2006, something happened. Justice Kennedy's views on race "softened."<sup>109</sup> Three cases figure prominently in this metamorphosis. The first case is *LULAC v. Perry*, where Justice Kennedy joined the four moderates on the Court and struck down a legislative district in Texas under § 2 of the Voting Rights Act.<sup>110</sup> The second case is *Parents Involved in Community Schools v. Seattle School District No. 1*, where the Court struck down voluntary racial integration plans for the public schools in Louisville and Seattle.<sup>111</sup> Justice Kennedy wrote a concurring opinion that looks nothing like his opinions of old. The third case is *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, decided this past Term.<sup>112</sup> This was an indirect challenge to the Second Reconstruction by way of disparate impact analysis.<sup>113</sup> In a surprising 5–4 decision, Justice Kennedy interpreted the Federal Housing Act to incorporate disparate impact review.<sup>114</sup> This Section examines these opinions in turn.

### 1. LULAC and Latino Essentialism

When it comes to Justice Kennedy's views about the Voting Rights Act, we know two things: first, that he is deeply committed to an anti-essentialist reading of anti-discrimination law, and the Voting Rights Act lies at the core of this commitment; and second, that he is ambivalent about the constitutionality of the Act. Taken together, these two commitments make Justice Kennedy a reliable vote on the Court for strict, narrow, and often acontextual readings of the Act.<sup>115</sup> This is also what makes *LULAC v. Perry*<sup>116</sup> such a puzzling opinion. This case is worthy of attention because it appears to compromise both commitments.

In *LULAC*, the Court faced the mid-decade Texas gerrymander orchestrated by Congressman Tom DeLay.<sup>117</sup> In an opinion authored by Justice Kennedy, the Court struck down one of the challenged

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109. Gerken, *supra* note 38, at 104.

110. 548 U.S. 399 (2006).

111. 551 U.S. 701 (2007).

112. 135 S. Ct. 2507 (2015).

113. *Id.*

114. *Id.*

115. See *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491 (1992); *Holder v. Hall*, 512 U.S. 874 (1994).

116. 548 U.S. 399 (2006).

117. See *The Texas Gerrymander*, N.Y. TIMES (Mar. 1, 2006), <http://www.nytimes.com/2006/03/01/opinion/01wed2.html>.

districts under § 2 of the Act.<sup>118</sup> Incidentally, this was the first time in the history of the Act that the Court had so held under § 2. In order to reach this conclusion, Justice Kennedy must face his anti-essentialist reading of anti-discrimination law. He must also confront his long-standing skepticism about the constitutionality of the Voting Rights Act. On both of these questions, his published opinion is nothing short of astounding.

Consider first the anti-essentialist critique. This is the concept that individuals must be treated as individuals and not as members of groups. Justice Kennedy is firmly within this camp, as we saw earlier. And yet, in *LULAC*, Justice Kennedy was taken by the fact that the Texas plan had removed Latinos from a particular district because they were about to achieve a numerical majority and act against the incumbent Republican congressman, Henry Bonilla.<sup>119</sup> This was something that the state could not do.<sup>120</sup> More importantly, Justice Kennedy's concern was that "the State took away the Latinos' opportunity because Latinos were about to exercise it."<sup>121</sup> That is to say, Latinos, not Democratic voters, were about to achieve real political power, and only then would the State step in and ensure their minority status. In Justice Kennedy's words:

Even if we accept the District Court's finding that the State's action was taken primarily for political, not racial, reasons, the redrawing of the district lines was damaging to the Latinos in District 23. The State not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active, dividing them with a district line through the middle of Laredo.<sup>122</sup>

This is a remarkable statement coming from a Justice who explicitly derides the essentialization of voters of color in the name of a particular brand of racial justice. This is the same Justice, after all, who wrote a decade earlier: "When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"<sup>123</sup> In the *Shaw* cases, treating

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118. *Id.* at 447.

119. *Id.* at 423-25.

120. *Id.* at 442.

121. *Id.* at 440.

122. *Id.* (citation omitted).

123. *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995) (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)); see *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting) ("The perceptions of the excluded class must also be

Democratic voters as black voters was to engage in demeaning stereotyping. In *LULAC*, to treat Latinos as Democratic voters was a cognizable harm under § 2. Reconciling the tension between the old Justice Kennedy and the new is difficult if not downright impossible.

One way out of this tension is apparent, yet ultimately flawed. In the *Shaw* cases, the plaintiffs argued successfully that the resulting shape of the majority-minority districts in question was bizarre to the point of unconstitutionality. As a statutory question, it could be argued that minority voters in North Carolina's District 12 did not have a § 2 right to their district. This is because they could not meet all three of *Thornburg v. Gingles*'s factors.<sup>124</sup> Quite obviously, they could not meet the first factor, the compactness requirement. The bizarre nature of the challenged districts made clear that black voters in District 12 were not "sufficiently large and geographically compact to constitute a majority in a single-member district."<sup>125</sup> In *LULAC*, however, Justice Kennedy concluded that Latino voters in the old District 23 held a § 2 right to their district. One could argue that this conclusion alone renders a comparison between the two cases inapposite.

To so exonerate Justice Kennedy would be to miss the most interesting and important part of his opinion in *LULAC*. To be sure, Justice Kennedy concluded that Latinos in District 23 held a § 2 right to their district, a right that the legislature could not take away from them. But far more telling is how hard he must labor to reach this conclusion.<sup>126</sup> The Chief Justice, for one, was not impressed:

Whatever the majority believes it is fighting with its holding, it is not vote dilution on the basis of race or ethnicity. I do not believe it is our role to make judgments about which mixes of minority voters should count for purposes of forming a majority in an electoral district, in the face of factual findings that the district is an effective majority-minority district.<sup>127</sup>

It is downright impossible to read the Chief Justice's dissent and not puzzle over what Justice Kennedy might be up to. It may very well be that he is intent on having a say on the clumsy and distasteful way in which Republicans, both in Texas and at the

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weighed, with attention to the cardinal rule that our Constitution protects each citizen as an individual, not as a member of a group.").

124. See 478 U.S. 30, 50-51 (1986).

125. *Id.* at 50.

126. See *LULAC v. Perry*, 548 U.S. 399, 423-42 (2006).

127. *Id.* at 511 (Roberts, C.J., dissenting) (emphasis omitted).

national level, conducted themselves.<sup>128</sup> But it is also true that whatever his motivations, Justice Kennedy clearly aligned himself with a view about race in the political context that he abhorred a decade before. *LULAC* does not square with *Shaw* and its progeny.

The second point is equally baffling. Up to his controlling opinion in *LULAC*, it is hardly a stretch to consider Justice Kennedy a foe of the Voting Rights Act in general and racial districts in particular. Consider in this vein his concurring opinion in *Georgia v. Ashcroft*,<sup>129</sup> decided in 2003:

As is evident from the Court's accurate description of the facts in this case, race was a predominant factor in drawing the lines of Georgia's State Senate redistricting map. If the Court's statement of facts had been written as the preface to consideration of a challenge brought under the Equal Protection Clause or under § 2 of the Voting Rights Act of 1965, a reader of the opinion would have had sound reason to conclude that the challenge would succeed. Race cannot be the predominant factor in redistricting under our decision in *Miller v. Johnson*, 515 U.S. 900 . . . (1995). Yet considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5.<sup>130</sup>

These are not the words of a staunch supporter of the Act but, rather, the words of one who is waiting for the right moment to strike it down on constitutional grounds. There can be no other way if the predominant factor test retains any vitality. This is because any time § 2 of the Act is invoked, race will predominate. This was *Shaw*, and this was also *Miller*.

In *LULAC*, however, race predominated, and unapologetically so. Yet Justice Kennedy was hardly the skeptic Justice he had been in the recent past. Instead, no hurdle proved too difficult for him: not the lower court's findings and the clear error test,<sup>131</sup> not the actual words of the lower court's opinion,<sup>132</sup> and certainly not the constitutional concerns that occupied him in the past. The right of Latinos in District 23 to their district must be vindicated, and Justice Kennedy joined the moderates and happily put himself up to the task.

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128. See Charles, *supra* note 41.

129. 539 U.S. 461 (2003).

130. *Id.* at 491 (Kennedy, J., concurring).

131. On this point, see *LULAC*, 548 U.S. at 497 (Roberts, C.J., dissenting).

132. See *id.* at 498-500.

## 2. Parents Involved and the Legacy of Brown

Justice Kennedy's concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>133</sup> offers a similarly telling example of Kennedy's evolving equal protection views. The opinion is vintage Kennedy: School districts can use race in student assignments, but can only do so as a last resort.<sup>134</sup> But Kennedy's concurring opinion is far more important because it continues with the story of Kennedy's transformation begun in *LULAC*. This is not the Kennedy of old, the author of narrow and inflexible opinions. This is a Justice willing to give complex constitutional questions their due care. Three arguments deserve close attention.

The first argument highlights the debate within the Court over the legacy of *Brown*. Chief Justice Roberts quoted from the plaintiffs' briefs in *Brown* that "the Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race."<sup>135</sup> He then asked, "What do the racial classifications at issue here do, if not accord differential treatment on the basis of race?"<sup>136</sup> Justice Thomas similarly argued that "[r]acial imbalance is not segregation" and so the school districts in Louisville and Seattle are not pursuing the constitutional goals of *Brown*.<sup>137</sup> With the Chief Justice, Justice Thomas wrote that the opposite is in fact true: The reformers in Louisville and Seattle are in the same moral and constitutional space as the segregationists who defended segregated school systems in *Brown*.<sup>138</sup>

The dissenters took a decidedly different view of history. Justice Stevens chided the Chief Justice for relying on *Brown* to strike down racial balancing plans. More specifically, he argued that the Chief Justice "rewrites the history of one of th[e] Court's most important decisions."<sup>139</sup> Justice Breyer similarly wrote that:

[I]t is a cruel distortion of history to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the

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133. 551 U.S. 701 (2007).

134. *Id.* at 798 (Kennedy, J., concurring in part and concurring in the judgment).

135. *Id.* at 747 (plurality opinion).

136. *Id.*

137. *See id.* at 750 (Thomas, J., concurring).

138. *See id.* at 773-74.

139. *Id.* at 799 (Stevens, J., dissenting).



circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined).<sup>140</sup>

Justice Kennedy's jurisprudence places him distinctly within the first camp, which views *Brown* and *Parents Involved* as morally equivalent. But his concurring opinion in *Parents Involved* betrays this understanding of his jurisprudence. His words could not be any clearer, or any more surprising:

This is by way of preface to my respectful submission that parts of the opinion by THE CHIEF JUSTICE imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," *ante*, at [40-41], is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education*, 347 U.S. 483 . . . (1954), should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown's* objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.<sup>141</sup>

Justice Kennedy's position is surprising because he is willing to recognize that the questions facing the Louisville and Seattle school boards are difficult questions, devoid of simplistic answers. This is a remarkable shift for a Justice who once agreed with the view that the creation of bizarre majority-minority districts bore an uncomfortable resemblance to racial apartheid.<sup>142</sup>

The second argument looks back to the *Grutter* case and the diversity rationale. To be sure, the mere use of a prior case as settled law should hardly qualify as noteworthy. But Kennedy is not simply accepting *Grutter* as settled law; rather, he is reversing himself within the space of four years.<sup>143</sup> Whereas in *Grutter* he chastised Justice O'Connor's use of the diversity rationale, in *Parents Involved* he suggested that "a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of

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140. *Id.* at 867 (Breyer, J., dissenting).

141. *Id.* at 787-88 (Kennedy, J., concurring in part and concurring in the judgment).

142. *See Shaw v. Reno*, 509 U.S. 630, 648 (1993).

143. *See J. Harvie Wilkinson III, Comment, The Seattle and Louisville School Cases: There Is No Other Way*, 121 HARV. L. REV. 158, 170 (2007).

that diversity, but other demographic factors, plus special talents and needs, should also be considered.”<sup>144</sup> Explaining this change is not easy.

The third argument focuses on what might well be the most influential conservative canard in history: Justice Harlan’s colorblind language in *Plessy v. Ferguson*.<sup>145</sup> The passage reads as follows: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>146</sup> Conservative jurists and commentators often turn to this language while criticizing affirmative action and similar policies as inconsistent with constitutional principles. This is an argument for the moral equivalence of racial segregation and racial integration.<sup>147</sup> All uses of race, no matter their motives, are suspect and presumed unconstitutional. As Chief Justice Roberts wrote at the close of his opinion in *Parents Involved*, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>148</sup>

Criticisms of this line of argument are plentiful, from diverse quarters.<sup>149</sup> The one place one would not expect a critique to arise is Kennedy’s chambers. In *Parents Involved*, however, this is exactly what Justice Kennedy did. In his words:

The statement by Justice Harlan that “[o]ur Constitution is color-blind” was most certainly justified in the context of his dissent in *Plessy v. Ferguson*, 163 U. S. 537, 559 . . . (1896). The Court’s decision in that case was a grievous error it took far too long to overrule. *Plessy*, of course, concerned official classification by race applicable to all persons who sought to use railway carriages. And, as an aspiration, Justice Harlan’s axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.<sup>150</sup>

This is a remarkable statement for any conservative jurist, and much more so for the jurist who penned *Miller v. Johnson* and who continually questions the constitutionality of the Voting Rights Act.

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144. *Parents Involved*, 551 U.S. at 797-98 (Kennedy, J., concurring in part and concurring in the judgment).

145. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

146. *Id.* at 559.

147. *Parents Involved*, 551 U.S. at 773-76 (Thomas, J., concurring).

148. *Id.* at 748 (plurality opinion).

149. See Ruth Colker, *Reflections on Race: The Limits of Formal Equality*, 69 OHIO ST. L.J. 1089 (2008); Daniel P. Tokaji, *Desegregation, Discrimination and Democracy: Parents Involved’s Disregard for Process*, 69 OHIO ST. L.J. 847 (2008).

150. *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in judgment).

It is aspirational in outlook yet realist in application. This is clearly a different Justice Kennedy.

### 3. Inclusive Communities Project and the Vestiges of Residential Segregation

The conclusion of this last Term brought us more of the same. In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, the Court considered a question that presaged a much larger debate about the Second Reconstruction.<sup>151</sup> In a narrow sense, the Court faced a straight-forward question: Are disparate impact claims cognizable under the Federal Housing Act?<sup>152</sup> In a 5–4 opinion, Justice Kennedy argued in the affirmative.<sup>153</sup> I will have much more to say about the implications of this decision for the Second Reconstruction. For my purposes in this Subsection, I simply want to note how Justice Kennedy introduced the issue. This was a legal question for which history and context mattered.

After the traditional recitation of facts, Kennedy turned immediately to the history of housing segregation in our country.<sup>154</sup> He first offered *Buchanan v. Warley*, decided in 1917, which declared de jure housing segregation unconstitutional.<sup>155</sup> Kennedy's next move was significant; just as he recognized that housing segregation had been unconstitutional for almost a century, he conceded that its "vestiges remain today, intertwined with the country's economic and social life."<sup>156</sup> This was due "to conditions that arose in the mid-20th century," including "[r]apid urbanization" and the resulting white flight to the suburbs.<sup>157</sup> Notably, the government was no mere bystander in all of this:

During this time, various practices were followed, sometimes with governmental support, to encourage and maintain the separation of the races: Racially restrictive covenants prevented the conveyance of property to minorities; steering by real-estate agents led potential buyers to consider homes in racially homogenous areas; and discriminatory lending practices,

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151. See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2510 (2015).

152. *Id.*

153. See *id.*

154. *Id.* at 2515.

155. 245 U.S. 60, 71, 82 (1917).

156. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2515.

157. *Id.*

often referred to as redlining, precluded minority families from purchasing homes in affluent areas.<sup>158</sup>

In due time, these practices led to their expected result. “By the 1960’s,” Justice Kennedy recognized, “these policies, practices, and prejudices had created many predominantly black inner cities surrounded by mostly white suburbs.”<sup>159</sup>

President Johnson responded to the “considerable social unrest” by establishing the National Advisory Commission on Civil Disorders, better known as the Kerner Commission.<sup>160</sup> Kennedy quoted the Commission’s report, including its conclusion that “[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.”<sup>161</sup> He also quoted its recommendation about the need for “a comprehensive and enforceable open-occupancy law making it an offense to discriminate in the sale or rental of any housing . . . on the basis of race, creed, color, or national origin.”<sup>162</sup> In the wake of Dr. King’s assassination, Congress responded by enacting the Commission’s recommendations, codified in the Fair Housing Act.<sup>163</sup>

Think about Justice Kennedy through the years, and particularly his uncompromising stance on questions of race. The early cases made no use of history or context. *Plessy* is *Korematsu* is *Brown* is *Grutter*. The use of race by the state was noxious and even dangerous. Racial classifications may be used only under extreme circumstances. His cites in this context to the First Regulation to the Reichs Citizenship Law of November 14, 1935, and South Africa’s apartheid laws are jarring. Beginning in 2006, however, his views began to soften. This leads me directly to the question of the next Part: How to explain this metamorphosis?

## II. KENNEDY IN THE MIDDLE: THE FACE OF A SUPER MEDIAN

Justice Kennedy’s jurisprudence is undergoing a radical transformation. From his early years on the Court and up until his dissenting opinion in *Grutter*, decided in 2003, Justice Kennedy could not be considered a friend of the civil rights community. But

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158. *Id.* (citation omitted).

159. *Id.* (citing KENNETH B. CLARK, DARK GHETTO: DILEMMAS OF SOCIAL POWER 11, 21-26 (1965)).

160. *Id.* at 2516.

161. *Id.*

162. *Id.*

163. *Id.*

things are clearly different, as argued in the previous Part. This Part explains the shift in relation to Kennedy's status as a super median.

#### A. What's in a Super Median?

The concept of swing—or median—justice is well ingrained in our political consciousness. This is the one justice in the Court's ideological middle, the one vote that decides all the important and contested cases. Justice O'Connor was widely seen as a swing voter throughout her years on the Court, and so was Justice Powell.<sup>164</sup> In recent years, and particularly since Justice O'Connor's retirement, Justice Kennedy is now widely considered the Court's swing Justice.<sup>165</sup>

But not all medians are the same. Consider the fact that Justices Marshall, Blackmun, and Souter could be considered at one time or another to have been the Court's median justices.<sup>166</sup> Differences in the power and influence of median justices are captured by the term "super median."<sup>167</sup> Super medians are those swing justices "who (1) are crucial to the formation of majority coalitions and, thus, to the outcome of any given decision and (2) are influential in dictating the terms of the Court's opinion and, thus, to the formulation of any precedent it establishes, especially in consequential or otherwise high-profile decisions."<sup>168</sup> In order for a swing justice to achieve the status of super median, she must be a consistent member of the majority coalition, and she must also be influential within that coalition. Put differently, the status of super median is "a function of the relative proximity between the swing justice and those nearest to him or her."<sup>169</sup>

A justice becomes a super median when two conditions are met. First, the ideological gap between the median justice and the justices to her left and to her right on the Court's ideological continuum grows, so that it is less likely it is that majority opinions

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164. Epstein & Jacobi, *supra* note 16, at 55.

165. See David Cole, *The 'Kennedy Court,'* THE NATION (July 31, 2006), <http://www.thenation.com/article/kennedy-court/>; Adam Liptak, *The Roberts Court: The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1; Dahlia Lithwick, *Swing Time: Anthony Kennedy—The New Sandra Day O'Connor*, SLATE (Jan. 17, 2006, 5:07 PM), <http://www.slate.com/toolbar.aspx?action=print&id=2134421>.

166. See Epstein & Jacobi, *supra* note 16, at 54.

167. *Id.* at 40–41.

168. *Id.* at 51.

169. *Id.* at 43.

can be formed without the median voter.<sup>170</sup> And second, the “overlap” in the distribution of the preferences of the median justice and the closest justices decrease.<sup>171</sup> As the justices’ preferences converge, the more likely it is that majority coalitions can form without the median.<sup>172</sup> This is exactly what happens to Justice Souter, the median Justice during the 1991 Term.<sup>173</sup> In contrast, as the preference distributions diverge, it is less likely that majority coalitions can form without the swing justice.<sup>174</sup> This is Justice O’Connor in 2001.<sup>175</sup> This is also Justice Kennedy in 2006,<sup>176</sup> the Term when the Court decided *Parents Involved*.

Notably, research suggests that the median swing justice, that is, “the Justice in the middle of a distribution of Justices,”<sup>177</sup> is less driven by ideology than other justices and more by “strategic and case-specific considerations.”<sup>178</sup> More importantly, these justices’ votes “correspond more closely with public opinion and less with personal preferences than the other justices.”<sup>179</sup> This finding reminds me of a cautionary note issued by then-Justice Rehnquist over a generation ago:

The judges of any court of last resort, such as the Supreme Court of the United States, work in an insulated atmosphere in their courthouse where they sit on the bench hearing oral arguments or sit in their chambers writing opinions. But these same judges go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events. Somewhere “out there”—beyond the walls of the courthouse—run currents and tides of public opinion which lap at the courthouse door. . . . [I]f these tides of public opinion are sufficiently great and sufficiently sustained, they will very likely have an effect upon the decision of some of the cases decided within the courthouse. . . . Judges, so long as they are relatively normal human

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170. *Id.* at 74.

171. *Id.* at 81.

172. *Id.* at 83.

173. *Id.*

174. *Id.* at 85.

175. *Id.* at 85, 87.

176. Epstein and Jacobi identify six super medians beginning in 1953. These are Justice Clark in the 1959 Term; Justice Goldberg during the 1962 Term; Justice O’Connor in the 1999, 2002, and 2005 Terms; Justice Powell during the 1986 Term; Justice White in the 1971 and 1987 Terms; and Justice Kennedy during the 1996, 1997, and 2006 Terms. *See id.* at 67.

177. Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1277 (2005).

178. Peter K. Enns & Patrick C. Wohlfarth, *The Swing Justice*, 75 J. POL. 1089, 1092 (2013).

179. *Id.* at 1103.

beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs.<sup>180</sup>

Chief Justice Rehnquist concedes that judges must be influenced by public opinion. Researchers generally agree with this conclusion.<sup>181</sup>

More crucially, recent work concludes that in the closely divided cases, “a significant relationship” only exists between the preferences of the public and the justice casting the deciding vote.<sup>182</sup> In other words, public opinion influences the Court’s median. And therein lies the key to solving the puzzle of Justice Kennedy’s curious metamorphosis.

## B. Justice Kennedy as Super Median

Constitutional law is whatever the super median says it is, particularly for the close cases. This is a remarkable power. Writing in reference to the 2010 Term, Noah Feldman explained:

It is Kennedy’s apparent unpredictability -- and his willingness to make common cause with both factions in different cases -- that is the source of his overwhelming power in court and country. This year, there have been nine 5-4 cases; Kennedy has been in the majority every time. (Last year he was the controlling vote in 12 of 17 cases decided 5-4; the previous year 20 out of 25.)<sup>183</sup>

This description neatly encapsulates Kennedy’s status on the Court. Justice Kennedy’s “unpredictability” is reflected in a wider preference distribution, which allows him to move among coalitions

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180. William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986).

181. See Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM J. POL. SCI. 74 (2011); Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468 (1997); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018 (2004); Isaac Unah, Kristen Rosano & K. Dawn Milam, *U.S. Supreme Court Justices and Public Mood*, 30 J.L. & POL. 293 (2015). But see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); Micheal W. Giles, Bethany Blackstone & Richard L. Vining, Jr., *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making*, 70 J. POL. 293 (2008); Helmut Norpoth & Jeffrey A. Segal, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711 (1994).

182. See Enns & Wohlfarth, *supra* note 178, at 1103-04.

183. Feldman, *supra* note 1.

within the Court with relative ease. He is part of most narrow majority coalitions because the gap between his ideological preferences and those of the justices on either side of him is wide.<sup>184</sup> That is the source of Kennedy's power and influence.

This is true of the recently completed 2014 Term.<sup>185</sup> Looking over the course of the Term, the measure of Justice Kennedy's influence appears muted. He was on the majority of the Court in 88% of cases decided.<sup>186</sup> Justice Breyer led the Court with 92%, and Justice Sotomayor came in second at 89%.<sup>187</sup> If we look only at the divided cases, Justice Kennedy was in the majority 80% of the time; Justice Breyer also led the Court here, at 86%, and Justice Sotomayor was second at 82%.<sup>188</sup> But his influence grows if we look only at the *closely* divided cases, the 5–4 cases. These are the difficult cases where the Court often divides along ideological lines, and where the super medians put their influence to use. Out of nineteen such cases, Justice Kennedy was in the majority fourteen times, or 74% percent.<sup>189</sup> More tellingly, he joined the four conservative Justices in five 5–4 decisions, and the moderate Justices in eight of these cases.<sup>190</sup> This is true of Justice Kennedy through the years, his ability to coalesce with both conservative and moderate coalitions.<sup>191</sup>

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184. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002). For the data for the 2014 Term, see *Measures*, MARTIN-QUINN SCORES, <http://mqscores.berkeley.edu/measures.php> (last visited Nov. 25, 2015).

185. See KEDAR BHATIA, SCOTUSBLOG, STAT PACK FOR OCTOBER TERM 2014, at 23 (Jun. 30, 2015), [http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB\\_Stat\\_Pack\\_OT14.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_Stat_Pack_OT14.pdf).

186. *Id.* at 21.

187. *Id.*

188. *Id.*

189. See *id.* at 22.

190. See *id.*

191. It is important to note that Justice Breyer was also in 74% of the 5–4 cases. See *id.* at 23. Unlike Kennedy, however, who joins the moderate wing of the Court eight times, Justice Breyer joins the conservative wing of the Court only once, in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015). See *id.* at 22. For the remaining five cases, the line-up of the justices does not follow a discernible pattern. Also, and more importantly, the 2014 Term appears to be an outlier for Justice Breyer. The prior Term, while Justice Kennedy joined every single 5–4 decision, Justice Breyer joined only 50% of them. See *id.* at 23. And the three Terms before that, he joined 48%, 47%, and 31% of these majorities, respectively. See *id.*



These nineteen cases do not describe the full measure of his influence. Far more important are the major cases of the Term, what Bradley Canon terms the “politico-moral” cases.<sup>192</sup> There were fourteen major cases.<sup>193</sup> Justice Kennedy joined the majority in twelve of these cases and, interestingly, so did Justice Breyer.<sup>194</sup> But a closer look at the four cases where they disagreed tells an important story. Notably, all four were 5–4 decisions.<sup>195</sup> In two of them, *Horne v. Department of Agriculture* (the California raisin growers case)<sup>196</sup> and *Glossip v. Gross* (the Oklahoma lethal injection protocol case),<sup>197</sup> the Court followed the classic liberal–conservative split.<sup>198</sup> In the other two cases, *Williams-Yulee v. Florida Bar* (a state ban on campaign funds for judges)<sup>199</sup> and *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* (the confederate flag on license plates case),<sup>200</sup> a conservative justice joined the moderate wing of the Court.<sup>201</sup> In other words, it took two defections from conservative justices (Justice Thomas in the confederate flag case and the Chief Justice in the campaign finance case) for Justice Breyer to match Justice Kennedy. Had the classic ideological lines held, Justice Kennedy would have been in the majority in every major closely divided case. Also, while Justice Breyer did not join the conservative wing of the Court in any closely divided case, Justice Kennedy joined the moderate wing five times, and with the Chief Justice, joined the moderates in *King v. Burwell*, the health care decision.<sup>202</sup>

This is one easy way to explain Justice Kennedy’s apparent jurisprudential evolution. Justice Kennedy’s views are changing because they can, because his status as super median allows him to do so. When Justice Kennedy wrote his majority opinion in *Miller*, for example, he did so from a position of weakness, in that he needed to preserve Justice O’Connor’s vote within the five-member majority. The following year, in *Bush v. Vera*, Justice O’Connor left no doubt about the centrality of her views in this area, as she both

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192. Bradley C. Canon, *The Supreme Court as a Cheerleader in Politico-Moral Disputes*, 54 J. POL. 637, 638 (1992).

193. See BHATIA, *supra* note 185, at 22.

194. *Id.*

195. See *id.*

196. 135 S. Ct. 2419 (2015).

197. 135 S. Ct. 2726 (2015).

198. See BHATIA, *supra* note 185, at 22.

199. 135 S. Ct. 1656 (2015).

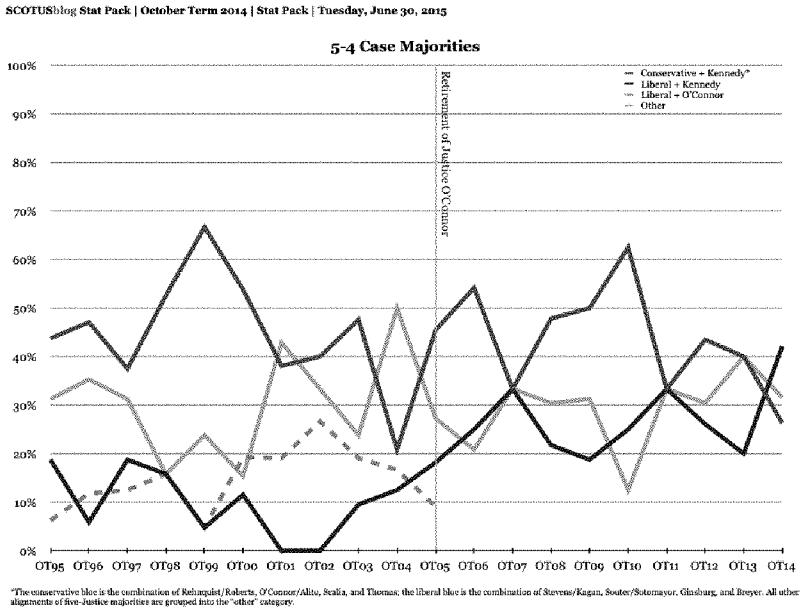
200. 135 S. Ct. 2239 (2015).

201. See BHATIA, *supra* note 185, at 22.

202. 135 S. Ct. 2480 (2015); see BHATIA, *supra* note 185, at 48.

wrote a majority opinion for the Court as well as a concurrence to her own majority.<sup>203</sup> Upon Justice O'Connor's retirement, Justice Kennedy could finally assert his own views. This is when we see *LULAC*, decided the Term following O'Connor's retirement.

In order to appreciate the true nature of Justice Kennedy's status on the Court, and his ability to coalesce with both conservative and moderate coalitions, consider the following graph:<sup>204</sup>



Note first how much the Court tilted to the right up until the time of Justice O'Connor's retirement. Even those years when Justice Kennedy or Justice O'Connor was considered a super median, they joined their moderate colleagues in a very low percentage of cases. In the 2005 Term, for example, O'Connor joined her moderate colleagues in approximately 15% of the 5–4 cases, and Justice Kennedy joined his moderate colleagues approximately 10% of the time in the 1996 Term. There are spikes in the graph, to be sure—note specifically Justice Kennedy's 1997 Term and O'Connor's 2002 Term—but these are exceptions to the general voting trend.

203. 517 U.S. 952 (1996).

204. See BHATIA, *supra* note 185, at 25.

The real story of this graph is the dramatic change seen in Justice Kennedy. The first major change happens around the time of Justice O'Connor's retirement. He went from joining no opinions with his moderate colleagues during the 2001 and 2002 Terms to joining them in 25% of the 5-4 decisions. This last Term, Kennedy joined them in 42% of these cases. And more remarkable still, the number of closely divided cases he joined with his conservative colleagues dipped in turn. This past Term, in fact, he joined them 26% of the time. The evolution in Justice Kennedy's behavior on the Court is clear. It corroborates the insight that super medians may be as flexible and inconsistent as they wish to be. In fact, to be a super median means precisely that, the independence to join one's colleagues as needed. In Justice Kennedy's case, it demonstrates the ability to adapt in order to remain in control of the Court's decision-making. This is *LULAC*. This is also *Parents Involved*.

As a super median, Justice Kennedy enjoys much freedom to expound on his particular constitutional vision. Super medians can do as they wish because any winning coalition must include their votes in the final tally. This is where idiosyncratic legal theories take hold and unorthodox readings of legal texts receive an honest hearing. According to his critics, this is a fit description of Justice Kennedy. As Feldman writes, "Justice Kennedy is different. His opinions tend to be grounded on strong statements of principle. Yet many find his tacking from right to left mystifying, frustrating and unpredictable. They question what consistent principles could guide such apparently disparate conclusions, and hint darkly at incoherence or self-aggrandizement."<sup>205</sup> This is one way to explain Justice Kennedy's shift: as a reflection of the independence afforded by his status as super median. The argument of the previous section complicates matters a bit.

I agree with Lyle Denniston that Justice Kennedy "is the virtual embodiment of the tendencies of the Roberts Court."<sup>206</sup> I might also agree, to a point, with Noah Feldman when he writes that this is "Justice Anthony Kennedy's country -- the rest of us just live in it."<sup>207</sup> Once we consider that public opinion is keenly felt on the

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205. Feldman, *supra* note 1.

206. Lyle Denniston, *Term Review: A More Activist Court*, SCOTUSBLOG (June 30, 2011, 5:08 PM), <http://www.scotusblog.com/2011/06/term-review-a-more-activist-court/>.

207. Feldman, *supra* note 1; Lyle Denniston, *The "Kennedy Court," Only More So*, SCOTUSBLOG (Apr. 9, 2010, 6:49 PM), <http://www.scotusblog.com/2010/04/the-kennedy-court-only-more-so/>.

swing justice, however, these statements take on a different light. Justice Kennedy's apparent metamorphosis on questions of race is a reflection of the conflicted way that public opinion views these questions. These are not easy questions. Justice Kennedy's evolving views are implicitly recognizing that fact.

### III. WHY IT MATTERS: LAW, THEORY, AND THE FATE OF THE SECOND RECONSTRUCTION

As a super median, Justice Kennedy is free and independent to decide cases as idiosyncratically as he wishes to decide them, subject to the constraints of public opinion. This is why we witness a shift in his views on race, from an uncompromising stance in his early years on the Court and through 2003, to a more flexible and contextual approach beginning around 2006. The implications of this shift are far-reaching. The implications for constitutional litigation are obvious: For the politico-moral cases,<sup>208</sup> those cases that grab the public's attention and energize the culture wars, the vote of Justice Kennedy is crucial. Such is the life of a super median. In turn, the implications for constitutional theory directly follow; this is the countermajoritarian difficulty on steroids. Is it possible to defend the notion that a single justice can determine some of the most important constitutional questions of his generation? The final Section examines the implications of this question for constitutional law generally and, in so doing, makes this abstract question more concrete. This is the question of the constitutionality of the Voting Rights Act, the "crown jewel" of the civil rights movement. Is the constitutionality of the Act in the hands of Justice Kennedy? Assuming that Justice Kennedy retains his status as super median, so that he remains independent to consult his newfound domains jurisprudence, how is he likely to answer this question?

#### A. Constitutional Litigation

Justice Kennedy's status as super median has obvious implications for constitutional litigation. As the one justice whose vote must form part of any majority coalition, litigators must pay undue attention to Justice Kennedy's preferences. This makes for

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208. Bradley Canon defines politico-moral cases as those controversies where "the disputants approach policy questions not in terms of political wisdom or experience, but in nonpolitical terms of absolute right or wrong." Canon, *supra* note 192, at 638.

challenging strategizing. Justice Kennedy's wide preference distribution—his known “unpredictability”—makes the task of predicting his vote difficult. But there are clues.

The first basic step is to focus on the “constitutional domain”<sup>209</sup> in question. Context matters. On this view, *LULAC* was not a case about Latinos and their nascent political power but, rather, about the First Amendment, political agency, and expression. Similarly, “[j]ury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life.”<sup>210</sup> Even when peremptory challenges are used by private litigants, though protecting a private interest, “the objective of jury selection proceedings is to determine representation on a governmental body.”<sup>211</sup> And in *Lee v. Weisman*, which involved the deliverance by a rabbi of prayer during a high school graduation ceremony,<sup>212</sup> Justice Kennedy described the event as follows:

Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.<sup>213</sup>

To the answer that a student is always free to miss the graduation ceremony, and so no coercion is involved by the state, Justice Kennedy responded that “[l]aw reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. . . . Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions.”<sup>214</sup> The similarity in the analysis to *Parents Involved* and *LULAC* is unmistakable.

Whether public schools, questions of political association and identity, or prison reform, Justice Kennedy is moved and influenced by “strategic and case-specific considerations.”<sup>215</sup> This is precisely how median justices behave. What we see from Justice Kennedy is in line with the way researchers understand the median justice.

The next step is more challenging. Once a particular domain is identified, litigators must try to assess the proper principles that

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209. See Gerken, *supra* note 38, at 106.

210. *Powers v. Ohio*, 499 U.S. 400, 402 (1991).

211. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991).

212. 505 U.S. 577, 581 (1992).

213. *Id.* at 595.

214. *Id.*

215. See Enns & Wohlforth, *supra* note 178, at 1092.

govern the particular domain.<sup>216</sup> Professor Gerken identifies the principles that govern the public school and political association domains in Justice Kennedy's constitutional world.<sup>217</sup> But she does so by cobbling together bits and pieces from Justice Kennedy's written opinions.<sup>218</sup> It is much harder to identify similar principles without the benefit of Kennedy's written accounts. Looking to the future, the task is to identify what those principles may be. I discuss three leading principles.<sup>219</sup>

The first principle—and here Justice Kennedy is channeling his inner-Brennan and Walter Murphy<sup>220</sup>—is the concept of human dignity.<sup>221</sup> In the recent *Brown v. Plata*, the California prison case,<sup>222</sup> Justice Kennedy wrote for a sharply divided Court that “[p]risoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.”<sup>223</sup> Justice Kennedy has deployed this argument in myriad cases and contexts, from the anti-sodomy statutes in *Lawrence v. Texas*<sup>224</sup> and the abortion laws in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>225</sup> to congressional restrictions on partial-birth abortions<sup>226</sup> and even suits against states in state courts for money damages, even when the states have broken federal law.<sup>227</sup> This is also true, more recently, in *Shelby County v. Holder*, a moment in the Court's history when the conservative majority let its imagination run free, striking down important portions of a super-statute under the guise of state dignity and an imagined “equality of States” doctrine.<sup>228</sup> The lesson is clear:

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216. See Gerken, *supra* note 38, at 126.

217. See *id.*

218. See *id.* at 108-22.

219. See Feldman, *supra* note 1.

220. See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 433 (1986); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 758 (1980) (“The fundamental value that constitutionalism protects is human dignity.”).

221. See Feldman, *supra* note 1.

222. 131 S. Ct. 1910 (2011).

223. *Id.* at 1928.

224. See 539 U.S. 558, 567 (2003).

225. See 505 U.S. 833, 851-52 (1992).

226. See *Gonzalez v. Carhart*, 550 U.S. 124, 157 (2007) (noting that the congressional ban “expresse[d] respect for the dignity of human life”).

227. See *Alden v. Maine*, 527 U.S. 706, 711-12, 749 (1999).

228. See Charles & Fuentes-Rohwer, *supra* note 10, at 483-84, 484 n.9 (2014) (citation omitted); Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 175-76 (2013), [http://www.yalelawjournal.org/pdf/1174\\_iyst6fvo.pdf](http://www.yalelawjournal.org/pdf/1174_iyst6fvo.pdf).

“Anyone who wants to win his vote would do well to argue that someone’s dignity is being violated somewhere.”<sup>229</sup>

The second principle is the jealous protection of the authority of the judiciary to interpret the Constitution.<sup>230</sup> Justice Kennedy is clearly a judicial supremacist, and this is true across myriad settings and contexts. The classic exposition of this principle appears in *City of Boerne v. Flores*, a case where Kennedy appeared miffed that Congress had attempted to overrule a judicial interpretation of a substantive constitutional provision.<sup>231</sup> According to Kennedy, this principle dated as far back as the founding and the canonical *Marbury v. Madison*.<sup>232</sup> This was something Congress could not do.<sup>233</sup> The principle was also present in *Plata*; Kennedy’s opinion for the Court came only after years of litigation and the disregard by state prison officials of court orders demanding prison reform.<sup>234</sup> This is also the wrongful districting cases,<sup>235</sup> and particularly *Miller v. Johnson*, a case where the Court worries that the DOJ is interpreting the Voting Rights Act unconstitutionally.<sup>236</sup> Justice Kennedy and his brethren make clear that the Court is in charge of constitutional questions.<sup>237</sup>

This is a marked change from the Court’s posture dating to the time of the Warren Court. Then, the Court happily deferred to the political branches on questions of congressional powers.<sup>238</sup> This is *South Carolina v. Katzenbach*,<sup>239</sup> this is also *Katzenbach v. Morgan*.<sup>240</sup> As *Shelby County* makes clear, this is not the conservative wing of the Roberts Court.

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229. See Feldman, *supra* note 1.

230. See *id.*

231. 521 U.S. 507, 514-15, 519 (1997).

232. *Id.* at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

233. See *id.* at 519.

234. See *Brown v. Plata*, 131 S. Ct. 1910, 1922-23 (2011).

235. See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993); Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 90-91.

236. 515 U.S. 900, 903, 905-06 (1995).

237. See *id.* at 912.

238. Luis Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U. L. REV. 697, 715 (2009).

239. 383 U.S. 301 (1966).

240. 384 U.S. 641 (1966); see Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1401-02 (2015); see also Fuentes-Rohwer, *supra* note 238, at 715-16 (“The *Morgan* case must be understood for what it was: a moment in time when the Court

A third principle is a healthy, if selective, distrust of the political branches and the lengths to which they will go to protect themselves.<sup>241</sup> This principle is straight out of the political process school. This is an important part of the story in *Bush v. Gore*, as the Court worries about a rogue state court changing the rules of the game in order to elect the state court's preferred candidate.<sup>242</sup> This is also *LULAC*, a case best explained as a reaction to the process by which Texas sought to change the rules of the game mid-census.<sup>243</sup> More recently, this is *Arizona State Legislature v. Arizona Independent Redistricting Commission*, which upheld Arizona's ballot initiative establishing an independent congressional redistricting commission in the face of contrary constitutional language under the Elections Clause.<sup>244</sup> And similarly, this is also *Alabama Legislative Black Caucus v. Alabama*, a challenge to the state's reapportionment plan.<sup>245</sup> This case reminds me of *LULAC* in reference to Justice Kennedy's vote. The majority appears to go out of its way to decide this case, in the face of what the principal dissent considers to be insurmountable procedural obstacles.<sup>246</sup>

There are limits to this distrust, of course. The easiest case for judicial intervention as a political process question might be the political gerrymandering arena. This is an area where politicians get away with a lot, yet the Court refuses to intervene, feigning an inability to discern judicially manageable standards. Justice Kennedy holds the controlling vote here. He is yet to find such a standard and is still in search of a surgical approach to the area, akin to the Court's intervention in the one person, one vote revolution. Justice Kennedy misunderstands this history, for the Court was not as surgical and modest as he might think; at different times, the Court declared almost all state legislatures and the United States House of Representatives unconstitutional.<sup>247</sup> This is not the behavior of a

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ceded some of its traditional power to define the substantive scope of the Constitution to Congress and its own power to enforce the Constitution.”).

241. See Feldman, *supra* note 1.

242. 531 U.S. 98 (2000).

243. See Charles, *supra* note 41.

244. 135 S. Ct. 2652, 2659 (2015).

245. 135 S. Ct. 1257 (2015).

246. *Id.* at 1275 (Scalia, J., dissenting).

247. See *Wesberry v. Sanders*, 376 U.S. 1, 20 (1964) (Harlan, J., dissenting) (“I had not expected to witness the day when the Supreme Court of the United States would render a decision which casts grave doubt on the constitutionality of the composition of the House of Representatives.”); *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 746 (1964) (Stewart, J., dissenting) (criticizing



modest and passive institution. Also, the reapportionment revolution leads inexorably from the equipopulation cases to the political gerrymandering cases. They are two sides of the same coin. More importantly as an institutional question, if the Court is able and willing to regulate the redistricting arena in the name of representative fairness, or campaign finance regulation—which is yet another example of distrust of the political branches—the Court could certainly handle the political gerrymandering area. But that’s an argument for another day.

Looking ahead, the lessons of this argument are both clear and unsurprising: Litigants must pay close attention to Justice Kennedy’s particularities and subtleties. It matters whether the issue is voluntary school integration plans or political gerrymandering, prison reform or the constitutionality of the Voting Rights Act, and it also matters how Kennedy interprets these various contexts. This is hardly news. Far more interesting and important are the implications of this argument for constitutional theory and the Bickelian challenge. This is the subject of the next Section.

## B. Constitutional Theory and the Bickelian Challenge

Writing in the early 1960s, and undoubtedly influenced by the perceived excesses of the Warren Court, Alexander Bickel offered his influential charge against the institution of judicial review.<sup>248</sup> This was the famed “counter-majoritarian difficulty.”<sup>249</sup> In his words:

[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. This, without mystic overtones, is what actually happens. . . . [I]t is the reason the charge can be made that judicial review is undemocratic.<sup>250</sup>

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*Reynolds* and its companion cases for declaring “unconstitutional the legislatures of most of the 50 States”).

248. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Vail-Ballou Press, Inc., 2d ed. 1986) (1962).

249. *Id.* at 16-17.

250. *Id.*; HENRY STEELE COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* 55 (1958) (“Whatever the logical support for the theory [of judicial review], it cannot be found in the philosophy of democracy if by democracy we mean majority rule; whatever the practical justification, it cannot be found in the defense of fundamental rights against the assault of misguided or desperate majorities.”).

The claim is ultimately about accountability and democratic pedigree. Supreme Court justices are unelected political actors, granted life tenure in order to render them independent by design. Their democratic pedigree is decidedly low. In contrast, the democratic pedigree of elected officials is concomitantly high. They are accountable to the electorate and must be cognizant of public opinions or else face the consequences in the next election.

Whatever one thinks about the straight-forward simplicity of the argument, it remains true that Bickel's charge dominated constitutional scholarship almost from the time that Bickel issued his challenge.<sup>251</sup> Some argue that it still does.<sup>252</sup> The response, in fact, is said to border on an "obsession."<sup>253</sup>

As a general matter, the claim is not terribly interesting, nor is it descriptively accurate. For all the noise that surrounds Bickel's famed difficulty, it is still true that the Court is seldom out of step with public opinion for long.<sup>254</sup> The appointment process ensures as

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251. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 712 (1995) ("[R]esponding to the countermajoritarian difficulty has been an important staple on the menu of constitutional theory since the appearance of Bickel's influential book."); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1288 n.2 (1982) ("The 'counter-majoritarian difficulty' has spawned the central line of constitutional scholarship for the last thirty years."); see also Croley, *supra*, at 712 n.66 (documenting some of the many published acknowledgments to Bickel's influence).

252. See Suzanna Sherry, *Too Clever by Half: The Problem with Novelty in Constitutional Law*, 95 NW. U. L. REV. 921, 921 (2001) ("[T]he 'counter-majoritarian difficulty' remains—some forty years after its christening—a central theme in constitutional scholarship. Indeed, one might say that reconciling judicial review and democratic institutions is the goal of almost every major constitutional scholar writing today . . ." (footnote omitted)).

253. See Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 380 (2008); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002).

254. See, e.g., David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POL. 652, 662 (1985) ("[T]he judicial activism of the post-New Deal Supreme Court was in fact surprisingly consistent with majoritarian principles."); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) ("The fact is, then, that the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."). See generally THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* (1989); Flemming & Wood, *supra* note 181; Michael W. Link, *Tracking Public Mood in the Supreme Court: Cross-Time Analyses of Criminal Procedure and Civil Rights Cases*, 48 POL. RES. Q. 61 (1995);

much.<sup>255</sup> To be sure, the Court is not a majoritarian institution in every case,<sup>256</sup> but this is hardly an indictment on the institution. The fact that the Court can stand against public opinion is an interesting question in its own right, but that is not the question that Bickel asked.<sup>257</sup>

For my purposes, the example of Justice Kennedy as super median indicts the institution of judicial review in a far more important and revealing way. It is hard enough to justify as a normative matter—though not impossible—granting the Supreme Court the power to overrule the present wishes of elected officials on the basis of vague and imprecise constitutional language. Bickel got this much right. But could anyone defend granting one justice the power to decide some of the most difficult and contested questions of public policy in a country of well over 300 million people? Put differently, how does one defend Justice Kennedy's role on the Court as super median?

This is an arresting claim. Consider in this vein Justice Kennedy's recent shift on questions of race. This Article argues that the best way to explain it is by looking to Kennedy's newfound status as super median, which in turn allowed him to contextualize

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William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993); James A. Stimson, Michael B. Mackuen & Robert S. Erikson, *Dynamic Representation*, 89 AM. POL. SCI. REV. 543 (1995). Legal scholars reach a similar conclusion. See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 609 (1993) (“[C]ontrary to laments about the countermajoritarian difficulty, even controversial judicial decisions often are majoritarian.”); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 7 (1996) (“The Supreme Court does not play the strong countermajoritarian role in defense of individual liberties that popular wisdom ascribes to it.”).

255. See Dahl, *supra* note 254, at 284-85. See generally GLENDON SCHUBERT, *THE CONSTITUTIONAL POLITY* (1970); Norpoth & Segal, *supra* note 181; Jeffrey A. Segal, *Measuring Change on the Supreme Court: Examining Alternative Models*, 29 AM. J. POL. SCI. 461 (1985). Influential legal scholars agree. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 47 (Amy Gutmann ed., 1997) (“If the Courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that.”).

256. See MARSHALL, *supra* note 254, at 55.

257. For a recent revitalization of the Bickelian challenge as a moral claim, see Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103.

his jurisprudence accordingly in domain-like fashion. Justice Kennedy is now able to explore his views about public schools, the crafting of district lines as politically associative practices protected by the First Amendment, or the role that the concept of human dignity must play in decision-making. The Constitution is whatever Justice Kennedy says it is, irrespective of text, history, precedent, or even Justice Kennedy's own views on the matter.<sup>258</sup> It is a brave new world, but that is precisely the world of the super median.

This is a remarkable power. It is also unjustifiable. Justice Kennedy's position on the Court, and his recent shift, offer an inimitable example of attitudinalist jurisprudence and its perils. To see more clearly the implications of this view, the next Section turns to a more concrete example. This is the ongoing debate over the constitutionality of the Voting Rights Act.

### C. Constitutional Law and the Challenge to the Second Reconstruction

To this day, the Voting Rights Act stands as the clearest example of our national commitment to eradicating racial discrimination from the political process. The problem at hand had proven quite difficult, even intractable. Dating back to the late nineteenth century, jurisdictions throughout the South institutionalized the mass disenfranchisement of otherwise eligible black voters.<sup>259</sup> This condition endured unabated for well over half a century. When Congress finally faced up to the problem, it could only do so from a position of weakness so long as southern congressmen held together. The resulting legislation—the Civil Rights Acts of 1957, 1960, and 1964—reflected this weakness. The best the legislation could do was open up the federal courts to adjudicate claims of racial discrimination in voting. But such a response proved no match for the ingenuity and recalcitrance of defiant southern jurisdictions. A stronger response was needed.

This was the Voting Rights Act of 1965.<sup>260</sup> The success of the Act can be attributed to the fact that it radically shifted basic legal

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258. In saying this, I do not intend to suggest that the relevant publics acquiesce to whatever the Court chooses to impose on them. The question of judicial impact is far more complicated than that, yet underappreciated.

259. See generally J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974).

260. Pub. L. No. 89-110, 79 Stat. 437.

burdens and presumptions. Under prior law, the federal government must come to local courts and carry its burden of showing the unconstitutionality of the laws under review. In other words, the laws were presumed constitutional unless and until the federal government could prove otherwise in open court. Under the Voting Rights Act, however, any voting law enacted by jurisdictions covered by § 4 of the Act is presumed to be unconstitutional until the federal government determines otherwise.<sup>261</sup> These covered jurisdictions were also subject to the appointment of poll watchers and voting registrars. No longer would the voting rights of voters of color be subject to the whims of local registrars and state and local governments.

Almost as soon as President Johnson signed the bill into law, South Carolina challenged the constitutionality of the new law. Unremarkably, in *South Carolina v. Katzenbach*, the Supreme Court sided with the overwhelming national coalition that supported the law.<sup>262</sup> In an opinion authored by Chief Justice Warren, the Court concluded that the Act was a rational response to a problem that had plagued the country for generations.<sup>263</sup> The Court was deferring to congressional wishes, to be sure, but this was no run-of-the-mill rationality review. Having myriad testimony and congressional findings at its disposal, the Court made use of them all, as if to justify the aggressive nature of the new law.<sup>264</sup> This approach to constitutional review did not sit well with Justice Brennan.<sup>265</sup> In notes he wrote to the Chief Justice on the margins of the first circulated draft of the opinion, Brennan questioned the need to include any reference to legislative findings in the opinion.<sup>266</sup> Justice Brennan was looking to the future. To be sure, the record in support of the Voting Rights Act was robust and exemplary. He knew that the Court would not always have access to such a record.

History has borne out Brennan's critique. In the very next case—*Katzenbach v. Morgan*<sup>267</sup>—the Court faced a similarly difficult

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261. § 4, 79 Stat. at 438.

262. 383 U.S. 301, 337 (1966).

263. *Id.*

264. *See id.* at 308-09.

265. *See* Luis Fuentes-Rohwer, *Legislative Findings, Congressional Powers, and the Future of the Voting Rights Act*, 82 IND. L.J. 99, 103 (2007); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State's Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 505-06 (2014).

266. *See id.*

267. 384 U.S. 641 (1966).

constitutional question: Assuming the constitutionality of the literacy test,<sup>268</sup> could Congress prohibit the denial of the right to vote to a person who completed a sixth-grade education in Puerto Rico (presumably an education in Spanish) due to her inability to read or write English?<sup>269</sup> The answer could not be clearer: Congress could presumably not do so unless it could show, as in *South Carolina*, that the state law was racially discriminatory.<sup>270</sup> But there was only one problem, which Justice Harlan was happy to point out in dissent: Congress had proffered no findings in support of this provision.<sup>271</sup> Not a one. This was nothing more than a “legislative announcement” that the law in question violated equal protection principles.<sup>272</sup> In writing the opinion for the Court, Justice Brennan must thus rely on traditional rational basis review, the kind that places few if any demands on legislatures. And that is precisely what he did. In the face of a barren record, he wrote, for example, that “§ 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.”<sup>273</sup> The Court was not about to engage in a review of a non-existent record, so it was left to argue that “[i]t is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.”<sup>274</sup> This was rationality “review” by name only.

Justice Brennan’s concerns took on added significance through the years. While upholding the constitutionality of the Act, the Court would often highlight facts on the record to support its decision. In *City of Rome v. United States*,<sup>275</sup> for example, the Court offered the following:

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268. See *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50 (1959).

269. See *Katzenbach*, 384 U.S. at 643-44.

270. *South Carolina v. Katzenbach*, 383 U.S. 301, 333-34 (1966).

271. *Katzenbach*, 384 U.S. at 669 (Harlan, J., dissenting) (“There is simply no legislative record supporting such hypothesized discrimination of the sort we have hitherto insisted upon when congressional power is brought to bear on constitutionally reserved state concerns.”).

272. *Id.*

273. *Id.* at 652 (majority opinion).

274. *Id.* at 653.

275. 446 U.S. 156 (1980).

In considering the 1975 extension, Congress acknowledged that largely as a result of the Act, Negro voter registration had improved dramatically since 1965. Congress determined, however, that “a bleaker side of the picture yet exists.” Significant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions. In addition, though the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions. Congress concluded that, because minority political progress under the Act, though “undeniable,” had been “modest and spotty,” extension of the Act was warranted.<sup>276</sup>

This is now an accepted axiom in our constitutional law, that Congress’s enforcement powers must be exercised only when supported by an adequate record. This is the central teaching of *City of Boerne v. Flores*.<sup>277</sup> But to suggest that this requirement began with *City of Boerne* is to be blind to the lessons of history. Justice Brennan could foresee this outcome a generation before.

This is where we find ourselves today. In *Shelby County*, the Court began the expected dismantling of the Voting Rights Act. The case exalted the indignity of subjecting the covered jurisdictions—and only the covered jurisdictions—to the Act’s preclearance regime.<sup>278</sup> With preclearance essentially out of the way, the next step was obvious: § 2 of the Act, which enforces the substantive core of the Fifteenth Amendment through a disparate impact test. This is a difficult question because the Court has interpreted the substantive provisions of that Amendment as enshrining an intent test. This would be a challenge to the constitutionality of the Second Reconstruction more generally, as myriad statutes enforce the substantive component of the Reconstruction Amendments with a disparate impact analysis. A related question will look for answers to Justice Scalia’s challenge: Is the effort by state and private actors to avoid disparate impact liability in itself a species of discrimination actionable under the Fourteenth Amendment’s equality principle?<sup>279</sup>

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276. *Id.* at 180-81 (citations omitted).

277. 521 U.S. 507 (1997).

278. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

279. See *Ricci v. Destefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring). For a discussion that argues that *Ricci* suggests precisely this reading, among others, see Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 229 (2010); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1344 (2010).

And then came *Inclusive Communities Project*. In an opinion authored by Justice Kennedy, the Court upheld a long-standing reading of the Federal Housing Act as incorporating a disparate impact test.<sup>280</sup> I do not want to read too much into this case, as everything Justice Kennedy gave in the beginning of the opinion he took away at the end. He is not a full-blown liberal quite yet. But in light of our expectations prior to the case and what we took to be the continued demise of the Second Reconstruction, one case at a time, it is hard not to read the opinion as a respite from *Shelby County*. The Second Reconstruction might even be safe for now. How to explain it?

One answer returns to the central point of the Article: As a super median, Justice Kennedy pays attention to public preferences and the real-life impact of his decisions. He is not ready, as the nation is not ready, for the Second Reconstruction to end. Another answer is that, quite simply, the dignitary interests present in *Shelby County* are not present in the disparate impact analysis. *Shelby County*, as with the preclearance regime, may be sui generis.

A third answer looks to the specific context of the decided cases. In *Shelby County*, Justice Kennedy could look to the voter registration and turnout figures and be comforted by the fact that much has improved.<sup>281</sup> The same cannot be said for housing, as rapid suburbanization has moved the country away from the problems that the Kerner Commission Report flagged generations ago. The dream of an integrated society remains a dream. Or as Justice Kennedy put it in his concurring opinion in *Parents Involved*, Justice Harlan's paean to the colorblind principle in his *Plessy* dissent remains an elusive ideal.<sup>282</sup> "In the real world," Justice Kennedy wrote, "it is regrettable to say, it cannot be a universal constitutional principle."<sup>283</sup> Whether rightly or wrongly, it stands to reason that the same "real world" that led Justice Kennedy to soften his views in *Parents Involved* led him to soften them in the context of housing. After all, as in *Parents Involved*, "the problem before us defies so easy a solution."<sup>284</sup> This is another way of saying that if the recent past is

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280. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2525-26 (2015).

281. *Shelby Cty.*, 133 S. Ct. at 2618-22, 2626-27.

282. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J. concurring).

283. *Id.*

284. *See id.*



any indication, both context and history should lead Justice Kennedy to uphold the constitutionality of the Second Reconstruction.

#### CONCLUSION

The fate of the Second Reconstruction rests in the hands of Justice Kennedy. At first glance, this is a concern for anybody who cares about racial justice. But Justice Kennedy's recent jurisprudential turn on questions of race, which this Article explains by pointing to his status on the Court as a super median, is encouraging. This is an encouraging turn not because Justice Kennedy will ultimately reach the right answers to these questions, whatever those answers may be, but because he is turning away from the crass formalism on questions of race that exemplified his early jurisprudence. These are difficult questions, and Justice Kennedy is giving them their due attention.